

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

<b>PAUL F. VERVILLE,</b>	)	
	)	
<b>Plaintiff</b>	)	
	)	
<b>v.</b>	)	<b>Civil No. 92-138-B</b>
	)	
<b>DONNA E. SHALALA,</b>	)	
<b>Secretary of Health</b>	)	
<b>and Human Services,</b>	)	
	)	
<b>Defendant</b>	)	

**REPORT AND RECOMMENDED DECISION <sup>1</sup>**

This Social Security Supplemental Security Income and Disability appeal raises the question whether substantial evidence supports the Secretary's decision that the plaintiff's impairments do not meet or equal in severity any contained in Appendix 1, Subpart P, 20 C.F.R. 404 (the ``Listings"). Specifically, the plaintiff asserts that the Secretary's regulations require decisions as to equivalence to be made only by a program physician and that this was not done here.

In accordance with the Secretary's sequential evaluation process, 20 C.F.R. 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5 (1st Cir. 1982), the Administrative Law Judge found, in relevant part, that the plaintiff had not engaged in substantial gainful activity between March 21, 1989 and May 1, 1991 and met disability insured status requirements during that period,<sup>2</sup> Finding 1, Record p. 15; that during that period he suffered

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<sup>1</sup> This action is properly brought under 42 U.S.C. 405(g), 1383(c)(3). The Secretary has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 12, which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the Secretary's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument has held before me on March 1, 1993 pursuant to Local rule 12(b) requiring the parties to set forth at oral argument their respective positions with citation to relevant statutes, regulations, case authority and page references to the administrative record.

<sup>2</sup> The Administrative Law Judge noted that the plaintiff had filed an initial application for a Period of Disability and Disability

“severe impairments, characterized as a paraformis syndrome and somatic dysfunction of the spine, which did not meet or equal the level of severity of an impairment contained in [the Listings],” Finding 2, Record p. 15; that his allegations concerning his impairments and their impact on his ability to work were not credible, Finding 3, Record p. 16; that he had the residual functional capacity to perform the requirements of work except for lifting in excess of 20 pounds or more than 10 pounds on a sustained basis and performing other strenuous activities, Finding 4, Record p. 16; that although his impairments during the period in question prevented him from doing his past relevant work as a truck driver or machine operator he had the residual functional capacity to perform a full range of light work, Findings 5-6, Record p. 16; and that considering his age (45), education (high school equivalence) and vocational background (unskilled), application of Rule 202.20 of Appendix 2, Subpart P, 20 C.F.R. 404 (the “Grid”) directed a finding that the plaintiff was not disabled, Findings 7-8, Record p. 16. The Appeals Council declined to review the decision, Record pp. 3-4, making it the final determination of the Secretary. 20 C.F.R. 404.981, 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the Secretary's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. 405(g), 1383(c)(3); *Lizotte v. Secretary of Health & Human Servs.*, 654 F.2d 127, 128 (1st Cir. 1981). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusions drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

Having met the minimal requirements of showing that he had a severe impairment from March 21, 1989 through May 1, 1991 when he returned to work, the plaintiff had the burden at Step Three of proving that his impairment or combined impairments met or equaled a listed impairment. 20 C.F.R. 404.1520(d), 416.920(d); *Dudley v. Secretary of Health & Human*

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Insurance Benefits on July 24, 1989. That application was denied at the initial and reconsideration levels. The plaintiff filed a Request for Hearing which was dismissed at the plaintiff's request in an order dated November 20, 1989. Record p. 10.

*Servs.*, 816 F.2d 792, 793 (1st Cir. 1987).

The plaintiff contends that his back, neck and shoulder pain resulting from an incident in which he slipped and fell on ice-covered plastic while carrying a 100-pound bag of flour is an impairment equal in severity to section 1.05 of the Listings. Section 1.05 pertains to disorders of the spine and includes:

A. Arthritis manifested by ankylosis or fixation of the cervical or dorsolumbar spine at 30° or more of flexion measured from the neutral position, with X-ray evidence of:

1. Calcification of the anterior and lateral ligaments; or
2. Bilateral ankylosis of the sacroiliac joints with abnormal apophyseal articulations; or

B. Osteoporosis, generalized (established by X-ray) manifested by pain and limitation of back motion and paravertebral muscle spasm with X-ray evidence of either:

1. Compression fracture of a vertebral body with loss of at least 50 percent of the estimated height of the vertebral body prior to the compression fracture, with no intervening direct traumatic episode; or
2. Multiple fractures of vertebrae with no intervening direct traumatic episode; or

C. Other vertebrogenic disorders (e.g., herniated nucleus pulposus, spinal stenosis) with the following persisting for at least 3 months despite prescribed therapy and expected to last 12 months. With both 1 and 2:

1. Pain, muscle spasm, and significant limitation of motion of the spine; and
2. Appropriate radicular distribution of significant motor loss with muscle weakness and sensory and reflex loss.

Section 1.05, Appendix 1, Subpart P, 20 C.F.R. 404.

The plaintiff concedes that his impairments do not meet the Listings. However, he contends that the Administrative Law Judge arrived at the determination that his impairments were not "equal" to any in Section 1.05 of the Listings by improperly taking on the responsibility of a "designated" physician in making a decision in regard to medical equivalence.

There was no medical advisor present at the hearing to testify as to whether the plaintiff's impairments were equal to any in the Listings, nor was one required. *Rodriguez Pagan v. Secretary*

*of Health & Human Servs.*, 819 F.2d 1, 5 (1st Cir. 1987), *cert. denied sub nom. Pagan v. Bowen*, 484 U.S. 1012 (1st Cir. 1988). Several medical reports appear in the record. The record also includes Disability Determination and Transmittal forms signed by physicians employed by the Social Security Administration, accompanied by residual functional capacity evaluations. An administrative law judge is allowed to resolve conflicts in the medical evidence. *Rodriguez Pagan*, 819 F.2d at 4; *Lizotte*, 654 F.2d at 128. However, this does not mean he is allowed to substitute his own medical opinion for that of medical experts. The question is whether he has done so here.

At oral argument the plaintiff asserted that although an administrative law judge may determine whether an impairment “meets” any listed, he has the obligation to engage a medical expert to advise him as to whether an impairment equals in severity one contained in the Listings. The plaintiff argued that a physician’s signature on the Disability Determination and Transmittal form, which appears variously in the record as SSA-831-C3 and SSA-831-U3,<sup>3</sup> is insufficient to constitute a medical opinion as to whether the impairment meets or equals the Listings. The Secretary’s position is that 20 C.F.R. 404.1526 and 416.926 require an administrative law judge to consider the opinion of a “designated” physician but that the administrative law judge must make the final decision on the issue. Further, she stated, the opinion as to equivalency expressed on Disability Determination and Transmittal forms is adequate to meet the requirements of sections 404.1526 and 416.926.

Prior to the Supreme Court decision in *Sullivan v. Zebley*,<sup>4</sup> 493 U.S. 521 (1990), the issue of equivalence was controlled by Social Security Ruling 83-19. This ruling set forth the standard the Secretary was to apply to determinations of equivalence:

<sup>3</sup> The Secretary commented at oral argument that the forms are continually revised and, although the number on the form may change, the function served by the form remains the same.

<sup>4</sup> In *Zebley*, the Court held that the Secretary’s “listings-only” approach to determining child disability was contrary to 42 U.S.C. 1383 because it denied benefits to children whose impairments were severe and disabling even though the impairments were not listed and could not be compared in a meaningful way with the Listings; while adults had the remedy of vocationally related Steps Four and Five, children had no such opportunity. The decision did not address the role of the “designated” physician.

The impairment[s] may be judged to be equivalent to a listed impairment only if the medical findings (defined as a set of symptoms, signs, and laboratory findings) are at least equivalent in severity to the set of medical findings for the listed impairment. . . .

Equivalence can be found under three circumstances:

. . . .

2. An *unlisted* impairment, in which the set of criteria for the most closely analogous listed impairment is used for comparison with the findings for the unlisted impairment.

3. A *combination of impairments* (none of which meet or equal a listed impairment), each manifested by a set of symptoms, signs, and laboratory findings which, combined, are determined to be medically equivalent in medical severity to that listed set to which the combined sets can be most closely related.

Social Security Ruling 83-19, reprinted in *West's Social Security Reporting Service*, at 92

(Supp. 1989) (emphasis in original).

The standard for determining whether a listing was “met” was different from determining whether an impairment was “equal” to a one in the Listings:

By comparing the clinical signs, symptoms, and laboratory findings from the evidence of record with those in the listing, the administrative law judge (ALJ) can usually readily determine whether the listing is met. By contrast, a determination that an impairment or combination of impairments is *equal* to a listed impairment requires greater medical expertise. It must be determined whether the medical findings in the record are of at least equivalent *clinical significance* to the findings required in the listing.

*Id.* at 93 (emphasis in original).

Social Security Ruling 83-19 described the responsibility of the Administrative Law Judge in regard to determining medical equivalence:

At the hearing level, the [administrative law judge] is responsible for deciding the ultimate legal question of whether the listing is met or equaled. As trier of the facts, the [administrative law judge] is not *bound* by the medical judgment of a “designated” physician

regarding medical equivalency. However, the judgment of a ``designated" physician on this issue on the same evidence before the [administrative law judge] must be received into the record as expert opinion evidence and given appropriate weight.

*Id.* (emphasis in original). See also *Martinez Nater v. Secretary of Health & Human Servs.*, 933 F.2d 76, 77-88 and n.1 (1st Cir. 1991).

Although *Zebley* was decided on grounds other than the ``designated" physician rule, the Secretary stated at oral argument that Social Security Ruling 83-19 has been rescinded as a result of that case. To date, there has been no replacement.

The Secretary now relies on sections 404.1526 and 416.926 which provide, in relevant part:

(b) *Medical equivalence must be based on medical findings.* We will always base our decision about whether your impairment(s) is medically equal to a listed impairment on medical evidence only. Any medical findings in the evidence must be supported by medically acceptable clinical and laboratory diagnostic techniques. We will also consider the medical opinion given by one or more medical or psychological consultants designated by the Secretary in deciding medical equivalence.

20 C.F.R. 404.1526(b), 416.926(b) (emphasis in original). A ``designated" medical consultant is a physician ``employed or engaged to make medical judgments by the Social Security Administration, the Railroad Retirement Board, or a State agency authorized to make disability determinations." 20 C.F.R. 404.1526(c), 416.926(c).

At oral argument, the Secretary explained that the ``designated" physician's signature on the Disability Determination and Transmittal forms constitutes a medical opinion as to equivalence. If an impairment is found to meet or equal the Listings, the individual will be found disabled and therefore eligible for benefits. Only if the individual's impairment does not meet or equal one in the Listings will the physician go further and evaluate residual functional capacity.

In reviewing the record I observe that Dr. John Yindra ``signed off" on the appropriate form on January 9, 1991 (Record p. 161) and Dr. Paul Brinkman did so on February 20, 1991 (*id.* p.

153).<sup>5</sup> Dr. Yindra, a nonexamining "designated" physician, determined a residual functional capacity for the plaintiff, restricting him from heavy lifting. His only comment related to severity of impairment was the following notation: "Chronic low back and neck pain with minimal finding of radiculopathy. Primarily pain, [decreased range of motion] and deconditioning. MRI [showing] no significant pathology except for arthritic spurring of [cervical] spine." Record p. 213. Dr. Brinkman, another Social Security program physician, found a similar residual functional capacity, noting in addition only decreased range of motion and that the plaintiff had stated that he could do light work. *Id.* p. 227. Contrary to the plaintiff's assertion that no physician has rendered an opinion as to medical equivalence, I conclude that the signatures of Drs. Yindra and Brinkman are sufficient to attest to their findings that the plaintiff's impairment did not equal any in the Listings and that further evaluation, therefore, was needed to serve the sequential evaluation process.

In arriving at his decision that the plaintiff was capable of performing light work and was therefore not disabled, the Administrative Law Judge appears to have relied primarily on the reports furnished by Drs. Haigney, Lanni and Perotta. Dr. Perotta, a general surgeon, examined the plaintiff in October, 1990 at the request of his treating physician, Dr. Suske. Dr. Perotta diagnosed: "Paraformis syndrome bilaterally. Nerve impingement at L4 and L5 is suspected. Radiculopathy of the right extremity. . . . Somatic dysfunction of the cervical, dorsal, and lumbar areas." *Id.* p. 234. He remarked that the plaintiff needed to continue physical therapy and muscle strengthening, that he showed marked deconditioning and that he needed work hardening. *Id.* pp. 234-35. Dr. Haigney, a neurologist who examined the plaintiff twice in 1989, stated that he had an "exacerbation of his lumbar strain," and suggested that the radiculopathy was resolving and that he did not expect a permanent impairment. *Id.* at 130-31. Dr. Lanni, who performed an examination on behalf of the workers' compensation insurance carrier, commented that the plaintiff "may be using his physical symptoms to manipulate for secondary gain" and that he had the functional

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<sup>5</sup> Similar forms, signed by Drs. Good and Brinkman appear earlier in the record in conjunction with the plaintiff's 1989 application for benefits. Record pp. 41, 47.

capacity to work. *Id.* at 118. The Administrative Law Judge concluded that "the claimant's allegations of disabling pain are contradicted by the scant medical findings of mild cervical radiculopathy, by the essentially normal neurological examinations, and by physicians' observations which refute the claimant's testimony." *Id.* at 15. The Administrative Law Judge did not substitute his own medical opinion for that of a physician in this matter either; instead, he considered the various medical opinions available to him in reaching his decision that the plaintiff was not disabled. The evidence as a whole suggests that there are no significant limitations. Having reviewed the record, I find that the Secretary's decision is supported by substantial evidence.

Finally, I acknowledge the plaintiff's concern, expressed at oral argument, that since it is the plaintiff's burden at Step Three to show that his impairment meets or equals the Listings, it would be difficult to meet this burden because a claimant does not have access to "designated" physicians for medical review. *Martinez Nater*, 933 F.2d at 79 n.3, suggests that a variety of documents would serve the purpose of an opinion concerning medical equivalence. The regulations effective April 1, 1992 clearly indicate that all medical opinions will be evaluated, regardless of the source, although the weight accorded them may vary. 20 C.F.R. 404.1527(d), 416.927(d) (1992). The regulations in effect when the plaintiff filed his claim were less specific but stated that "[w]e have to review the medical findings and other evidence that support a physician's statement that you are disabled." 20 C.F.R. 404.1527, 416.927 (1991) (emphasis in original). Therefore, a medical opinion provided by the claimant that states that his impairment meets or equals one in the Listings would have to be considered along with those provided by a physician employed by the Secretary.

For the foregoing reasons, I recommend that the Secretary's decision be **AFFIRMED**.

### ***NOTICE***

***A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive***

***memorandum shall be filed within ten (10) days after the filing of the objection.***

***Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.***

***Dated at Portland, Maine this 17th day of March, 1993.***

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***David M. Cohen***  
***United States Magistrate Judge***